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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/723,575	11/26/2003	David Watzke	09815180-0006	9112
69139	7590	09/10/2007		
LOEB & LOEB, LLP 321 NORTH CLARK SUITE 2300 CHICAGO, IL 60610-4746			EXAMINER ELOSHWAY, NIKI MARINA	
			ART UNIT 3781	PAPER NUMBER
			MAIL DATE 09/10/2007	DELIVERY MODE PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

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Office Action Summary	Application No. 10/723,575	Applicant(s) WATZKE ET AL.	
	Examiner Niki M. Eloshway	Art Unit 3781	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 26 June 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 24-53 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 24-53 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on June 26, 2007 has been entered.

Terminal Disclaimer

2. The terminal disclaimer filed on October 19, 2006 disclaiming the terminal portion of any patent granted on this application which would extend beyond the expiration date of U.S. Application No. 10/412,008 has been reviewed and is accepted. The terminal disclaimer has been recorded.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 24, 25, 36 and 37 are rejected under 35 U.S.C. 102(b) as being anticipated by Yang (U.S. 6,378,325). Yang teaches a container having a removable lid 3, and a container body 1, 2. The container body has an open top, shown in figure 1, an upper chamber holding salad 6 and a lower chamber at lead line 5, the selective barrier is element 2.

Claim Rejections - 35 USC § 103

5. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

6. Claims 26-29, 31-34, 38-41, 45, 47, 49, 51 and 52, are rejected under 35 U.S.C. 103(a) as being unpatentable over Yang (U.S. 6,378,325) in view of Florian (U.S. 3,989,158). Yang does not teach the upwardly angled extension of the barrier. Florian, as seen in Fig. 6, teaches the upwardly angled extension at 32 for wedging with the outer container. It would have been obvious to make the barrier of Yang conform the shape of the outer container as taught by Florian to ensure that the extension remains properly seated in the outer container and is not accidentally displaced by the contents on top of the barrier.

Regarding claims 45, 47, 49 and 52 any lid of a container would serve as the bottom of the container body when the container is inverted. Note that the limitations of claims 45, 47, 49, 51 do not require the lid to support the container on a surface.

Regarding claim 51, Florian, as seen in Fig. 6, teaches a positively engaged barrier. It would have been obvious to make the barrier of Yang with a positively engaged barrier, as taught by Florian, in order to ensure that the extension remains properly seated in the outer container and is not accidentally displaced by the contents on top of the barrier.

7. Claims 30, 35, 42 and 43 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yang (U.S. 6,378,325) in view of Florian (U.S. 3,989,158), as applied to claims 26, 31 and 38 above, and further in view of Ferguson (U.S. 6,153,237). The primary reference of Yang does not specifically state that the lid forms a liquid tight seal. Ferguson teaches that it is known to provide a compartmented container with a lid which forms a liquid tight seal (see col. 5 lines 21-27). It would have been obvious to one having

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ordinary skill in the art at the time the invention was made to provide the modified device of Yang with the lid forming a liquid tight seal, as taught by Ferguson, in order to keep the contents of the device fresh.

Regarding claim 43, any lid of a container would serve as the bottom of the container body when the container is inverted. Note that the limitations of claim 43 do not require the lid to support the container on a surface.

8. Claim 44 is rejected under 35 U.S.C. 103(a) as being unpatentable over Yang (U.S. 6,378,325) in view of Florian (U.S. 3,989,158) and Ferguson (U.S. 6,153,237), as applied to claim 43 above, and further in view of Longstreth (U.S. 6,073,795). The primary reference of Yang teaches a domed lid with a knob. Longstreth teaches that it is known to provide a salad bowl lid with a flat upper surface (see figure 4). It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the modified device of Yang with the lid having a flat upper surface, as taught by Longstreth, in order to allow the device to be stored in a variety of positions and in order to facilitate stable stacking with a like container.

9. Claims 46, 48, 50 and 53 are rejected under 35 U.S.C. 103(a) as being unpatentable over Yang (U.S. 6,378,325) in view of Florian (U.S. 3,989,158), as applied to claims 45, 47, 49 and 52 above, and further in view of Longstreth (U.S. 6,073,795). The primary reference of Yang teaches a domed lid with a knob. Longstreth teaches that it is known to provide a salad bowl lid with a flat upper surface (see figure 4). It would have been obvious to one having ordinary skill in the art at the time the invention was made to provide the modified device of Yang with the lid having a flat upper surface, as taught by Longstreth, in order to allow the device to be stored in a variety of positions and in order to facilitate stable stacking with a like container.

Response to Amendment

10. The drawings were received on October 19, 2006. These drawings are acceptable.

Response to Arguments

11. Applicant's arguments filed June 26, 2007 have been fully considered but they are not persuasive. Applicant argues that Yang does not teach a barrier sufficiently configured to provide passage of relatively small food ingredients both into and out of the lower chamber. The examiner disagrees with this position because small food ingredients are allowed to pass through the barrier of Yang provided that they are smaller than the aperture size. Specifically, granular and diced food ingredients may easily pass through the barrier of Yang. Once the food ingredients are received into the lower chamber they may pass back into the upper chamber when the container is inverted. There is no structural difference between the present invention and the container of Yang which would prevent the container of Yang from performing the function set forth in the claims.

12. In response to Applicant's argument that having water melt pass through the barrier teaches away from combining the contents, it has been held that a claim containing a "recitation with respect to the manner in which a claimed apparatus is intended to be employed does not differentiate the claimed apparatus from a prior art apparatus" if the prior art apparatus teaches all the structural limitations of the claim. *Ex parte Masham*, 2 USPQ2d 1647 (Bd. Pat. App. & Inter. 1987). Thus, if a prior art structure is capable of performing the intended use as recited in the preamble, or elsewhere in a claim, then it meets the claim.

13. Regarding the upwardly angled extension, Applicant argues that neither Yang nor Florian teach this limitation. The rejections set forth above, and in the previous Office Actions, use the upwardly angled extension of Florian to modify the primary reference of Yang. The motivation for providing the upwardly angled extension of Florian to Yang is disclosed in Florian. Florian teaches that the upwardly angled wall 32 is provided for additional security (see first paragraph in col. 4 of Florian).

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14. Regarding the liquid tight seal, Applicant argues that there is no motivation to make the lid of Yang capable of forming a liquid tight seal. The examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case, it is well known in the art to provide a lid with a liquid tight seal in order to preserve freshness, to prevent contamination of the contents or to prevent leakage of the contents during storage or transport. Such a modification is well known and widely used in the food container art.

Conclusion

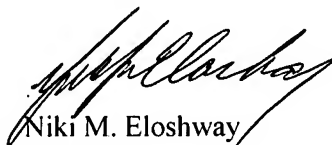
15. **THIS ACTION IS MADE NON-FINAL.**

16. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Niki M. Eloshway whose telephone number is 571-272-4538. The examiner can normally be reached Monday through Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anthony Stashick can be reached on 571-272-4561. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Niki M. Eloshway
Examiner
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nme